Supreme Court, U. S.
FILED
JUL 28 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-752

NATIONAL LABOR RELATIONS BOARD,
Petitioner

-v.-

THE CATHOLIC BISHOP OF CHICAGO, A CORPORATION SOLE
AND
DIOCESE OF FORT-WAYNE SOUTH BEND, INC. ET AL
Respondents.

BRIEF *AMICUS CURIAE* FOR THE BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS

LEO PFEFFER
15 East 84th Street
New York, N. Y. 10028

EARL W. TRENT, JR.
American Baptist Churches
in the USA
Valley Forge, Pa. 19481

INDEX

	Page
Interest of the Amicus	2
Question Presented	2
Constitutional Provisions Relied Upon	3
Summary of Argument	3
Argument	4
I. The Board's Exercise of Jurisdiction Over The Employers And Its Orders To Bargain Collectively Violate The Establishment Clause Of The First Amendment	4
A. Introductory	4
B. The Mandate of Neutrality	8
C. Inhibition of Religion	9
D. Entanglement	10
II. The Board's Exercise Of Jurisdiction Over The Employers And Its Orders To Bargain Collectively Violate The Free Exercise Clause Of The First Amendment	12
A. Introductory	12
B. Free Exercise Limitations on Governmental Intervention	14
C. Free Exercise and Compulsory Collective Bargaining	16
Conclusion	17

CITATIONS

	Page
Cases:	
Abington School District v. *Schempp*, 374 U.S. 203 (1963)	9
Cantwell v. *Connecticut*, 310 U.S. 296 (1940)	14
Committee for Public Education and Religious Liberty v. *Nyquist*, 413 U.S. 756 (1973)	8

	Page
Earley v. *Di Censo*, 403 U.S. 602 (1971)	11
Engel v. *Vitale*, 370 U.S. 421 (1962)	8
Everson v. *Board of Education*, 330 U.S. 1 (1947)	8, 10
Girouard v. *United States*, 328 U.S. 61 (1946)	15
Jacobson v. *Massachusetts*, 197 U.S. 11 (1905)	15
Kedroff v. *St. Nicholas Cathedral*, 344 U.S. 94 (1952)	7
Lemon v. *Kurtzman*, 403 U.S. 602 (1971)	8, 11
McCollum v. *Board of Education*, 333 U.S. 203 (1948)	8
People ex rel. Wallace v. *Labrenz*, 411 Ill. 618, certiorari denied, 344 U.S. 824 (1952)	15
Pierce v. *Society of Sisters*, 268 U.S. 510 (1925)	13
Prince v. *Massachusetts*, 321 U.S. 158 (1944)	15
Roemer v. *Board of Public Works of Maryland*, 426 U.S. 736 (1976)	3
Sherbert v. *Verner*, 374 U.S. 398 (1940)	15
Torcaso v. *Watkins*, 307 U.S. 488 (1961)	10
United States v. *Ballard*, 322 U.S. 78 (1944)	14
United States v. *Macintosh*, 341 U.S. 605 (1931)	15
Watson v. *Jones*, 80 U.S. 679 (1872)	7
Wisconsin v. *Yoder*, 406 U.S. 205 (1972)	15
Wolman v. *Walter*, 433 U.S. 229 (1977)	9, 11 12, 13
Constitution:	
United States Constitution, First Amendment passim	3
Miscellaneous:	
J. Elliot, *The Debates in the Several States Conventions on the Adoption of the Federal Constitution*, 2nd ed. (1888)	5
Encyclical of Pope John XXIII	8
Federalist Papers (Modern Library ed. 1937)	6
Jefferson's Writings, ed. Ford	5
Pfeffer, *The Supremacy of Free Exercise*, Georgetown Law Journal	6
Writings of James Madison, ed. Hunt (1900–1909)	5

NATIONAL LABOR RELATIONS BOARD,
Petitioner

–v.–

THE CATHOLIC BISHOP OF CHICAGO,
A CORPORATION SOLE

AND

DIOCESE OF FORT-WAYNE SOUTH BEND, INC. ET AL
Respondents

BRIEF *Amicus Curiae* for The Baptist Joint Committee on Public Affairs

---

This brief *amicus curiae* is submitted with the consent in writing of all parties herein.

INTEREST OF THE AMICUS CURIAE

On matters of public affairs, the Baptist Joint Committee on Public Affairs represents the American Baptist Churches in the U.S.A., the Baptist General Conference, the National Baptist Convention, the National Baptist Convention, Inc., the North American Baptist Conference, the Progressive National Baptist Convention, Inc., the Seventh Day Baptist General Conference, and the Southern Baptist Convention. These Baptist groups have more than 27 million members who have a direct interest in church-state relations and religious freedom.

The Baptist Joint Committee has as one of its mandates the obligation to act "whenever Baptist principles are involved, or jeopardized through governmental action. . . ." Among Baptists religious liberty is a fundamental religious principle, and in the opinion of the Baptist Joint Committee on Public Affairs the principle of religious liberty is jeopardized by the governmental action sought to be justified by the petitioner in this case.

QUESTION PRESENTED

The question presented as set forth in the brief for the National Labor Relations Board is whether application of the National Labor Relations Act to schools operated by the Roman Catholic Church, which teach both religious and secular subjects, violates the Establishment or Free Exercise Clauses of the First Amendment. The question to which this brief of the *amicus* is addressed is somewhat narrower: specifically, it is whether the Act can constitutionally empower the Board to compel parochial or church-related schools at the elementary and secondary levels to bargain collectively with unions representing the teachers at those schools. The *amicus* does not at this stage of the controversy deem it necessary for the Court to decide whether the asserted immunity should extend to non-teaching personnel such as maintenance employees in these schools or even to teaching employees in those church-related institutions of higher education which may constitu-

tionally receive tax-raised funds to support some aspects of their operations. See, e.g., *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736 (1976).

In so restricting the scope of this brief we do not intend to indicate thereby that in our view it would not be violative of the First Amendments guaranties for the Board to mandate collective bargaining in respect to non-teaching personnel in parochial schools or teaching personnel in educational institutions at the college or university levels. We suggest only that it is not necessary for the Court to decide that question in the present case.

Nor do we intend to indicate agreement with the conclusion of the National Labor Relations Board (hereinafter, the Board) that the National Labor Relations Act authorizes the action it has taken in the present case. On the contrary, we have grave doubts that Congress had such an intent in its enactment of the law. We do not argue this point in our brief, but we do note here that adjudication of the constitutional issues raised in this case will be avoided if the Court determines that the Board acted beyond its statutory authority.

CONSTITUTIONAL PROVISIONS RELIED UPON

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. . .

SUMMARY OF ARGUMENT

The Court in this case is faced with the unavoidable necessity of choosing between competing national interests: the promotion of collective bargaining and the constitutional proscription of laws respecting an establishment of religion or prohibiting its free exercise. Where there is a clash between these interests, it is obvious that the Court must prefer the latter.

We believe there is such a clash in the present case, and that it arises long before the Board seeks judicial enforcement of its order to the institution to bargain collectively. It arises as soon as the Board takes any administrative action under the statute after it has determined that the employer is a bona fide religious school.

The same constitutional principles under the Establishment Clause which this Court has held in many cases to bar governmental financing of the operations of religious schools beyond narrowly prescribed limits, bars equally governmental exercise of jurisdiction under the National Labor Relations Act. The reason for this is that the primary effect of the statutory provisions relevant to the present case would be the inhibition of religion and their enforcement would result in unavoidable government entanglement with religion.

Exercise of jurisdiction also violates the Free Exercise Clause since there is not, nor can there be any governmental interest so compelling as to justify the restrictions the Act places upon religious schools in the fulfillment of their sacred mission.

ARGUMENT

I. The Board's Exercise Of Jurisdiction Over The Employers And Its Orders To Bargain Collectively Violate The Establishment Clause Of The First Amendment

A. *Introductory*

What is presented to the Court in the present case is a clash of conflicting interests. On the one hand is the governmental interest in promoting collective bargaining between employers and employees. The implementation of that power within the context of the present litigation is the National Labor Relations Act. Although the ultimate source of that power is the constitutionally granted authority to Congress to regulate interstate commerce, it is in that sense not different from any other legislative power granted to Congress under a constitution based upon the

concept of limited powers, inherent in the history of the Constitution and expressed in the Tenth Amendment. Enactment of the National Labor Relations Act was not indispensible for the survival of the national government or of the United States; the fact that the nation existed and flourished for more than a century and a half in its less than two centuries of existence is quite clear proof of that. Even more recent in its origin is the determination of the Board to apply and enforce the Act against churches in their operations of religious schools. No one can contend that our nation would not survive and flourish if collective bargaining on the part of religious schools remained voluntary rather than governmentally mandated.

The Establishment and Free Exercise Clauses stand on a different footing. They express values inherent in our democratic form of government. When the Constitution was presented to the people for approval the chief obstacle was the absence of a bill of rights, particularly one securing against established or coerced religion. The defenders of the Constitution argued that this was unnecessary, for as James Madison stated, "the government has no jurisdiction over it [religion]."[1] James Wilson argued that "all is reserved in a general government which is not given," and that since the power to legislate on religion or speech or press was not given to the federal government, the government did not possess it, and there was therefore no need for an express prohibition.[2] Replying to the charge "that there is no security for the rights of conscience," Wilson queried:

> . . . what part of this system puts it in the power of Congress to attack those rights? Where there is no power to attack, it is idle to prepare the means of defence.[3]

Alexander Hamilton argued that a bill of rights, not only

---

[1] Writings of James Madison, ed. Hunt (1900–1909), Vol. V. p. 176

[2] See *Jefferson's Writings*, ed. Ford, Vol. V, p. 371

[3] J. Elliot, *The Debates in the Several States Conventions on the Adoption of the Federal Constitution*, 2nd ed. (1888) Vol. II pp. 435–437.

was unnecessary, but would be dangerous, since it might create the inference that a power to deal with the reserved subject was in fact conferred. Writing in the *Federalist* he said:

> I go further and affirm that bills of rights in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than was granted. For why declare that things shall not be done which there is no power to do?"[4]

The generation that adopted the Bill of Rights was not satisfied with these assurances. Under the leadership of Jefferson and Madison (the latter originally unconvinced about the need of such a bill) it demanded and won inclusion in the Constitution of the guaranty of fundamental rights, foremost of which was freedom from established or coerced religion.[5] In a conflict between so highly valued a constitutional right and a purely statutory right to collective bargaining the former must be preferred, a preference which in any event would be mandated by the principle that in a conflict between earlier and later expressions of constitutional or statutory intent it is the later one which must be given effect by the courts.

It is hardly an adequate response to urge, as the Board does in its brief (at p. 29) that

> . . . neither the Employers nor the court of appeals has taken the position that there are *no* subjects that may be bargained about without raising constitutional problems. If a union were ever to demand that the Employers negotiate about a subject that the Employers believed to be inappropriate for collective bargaining under the Act or the Constitution, the Employers would be free to refuse to do so and to test the validity of their position before the Board and the

[4] *Federalist Papers* (Modern Library ed. 1937) p. 559

[5] See, Pfeffer, The Supremacy of Free Exercise, 61 Georgetown Law Journal 1115 (1963).

> courts. They would not be obliged to bargain about that subject unless, and until, the Board had rejected their claim and the Board's order had been enforced following judicial review. Even then, their obligation would be only to bargain in good faith, not to surrender their bargaining position or their belief. The Board's bargaining orders, therefore, would not impair the bishops' ultimate authority to govern the religious aspects of their schools. (Emphasis is original. Citation omitted.)

As we understand it, the position taken by the respondents and upheld by the court of appeals is not a denial of the existence of subjects which may be bargained about without raising constitutional problems, but rather that government may not constitutionally command the respondents to bargain collectively about any subject within the general purview of collective bargaining between employer and employees. It is the compulsion to bargain, not compulsion to agree on a particular term, that violates the Establishment and Free Exercise Clauses. One is hardly estopped from challenging a law compelling church attendance by reason of the fact that were there no such law he would have attended church anyway.

For this reason we find no merit in the assertion in the Board's brief (footnote p. 29) that "other Catholic schools quite similar to those involved here have voluntarily engaged in collective bargaining with unions representing the lay teachers." Moreover, it has been settled law since *Watson v. Jones*, 80 U.S. 679 (1872), that no governmental body has constitutional competence to adjudicate between conflicting intra-church interpretations of ecclesiastical law. *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952). The Board cannot impose upon the respondents herein an interpretation of canon law which they do not accept, at least in the absence of a conclusive determination by the highest ecclesiastical authority of the Catholic Church. Such a determination can hardly be read into the recognition (cited in the footnote on p. 25 of the Board's brief) of the duty of government "to protect the right of all its people, and particularly of its weaker members, the workers***," stated in

the 1961 encyclical of Pope John XXIII. If the encyclical forbade what the respondents claim, there would hardly be need for the Board's order in the present case or for judicial intervention to enforce it, since it may be assumed that the Catholic Bishop of Chicago and the bishops of the Diocese of Fort Wayne-South Bend would obey the papal mandate without being ordered to do so by a governmental body.

B. *The Mandate of Neutrality*

It is a common assumption that the purpose of the Establishment Clause is to restrain religion while that of the Free Exercise Clause is to protect it. The assumption arises from the fact that in most cases involving the Establishment Clause the situation presented to the courts is one in which government has sought to advance religion and the application of the Establishment Clause has been to forbid that advancement. See, e.g., *McCollum v. Board of Education*, 333 U.S. 203 (1948) (religious instruction in the public schools); *Engel v. Vitale*, 370 U.S. 421 (1962) (prayer in the public schools); *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (financial aid to church schools).

This assumption, however, is erroneous; the purpose of the Establishment Clause is neither to restrain nor advance religion, but to impose upon government a mandate of neutrality in respect to religion. As this Court said in *Everson v. Board of Education*, 330 U.S. 1, 18 (1947):

> ***[The First] Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the State to be their adversary. State power is no more to be used to handicap religions, than it is to favor them.

As we will indicate shortly, a challenge under the Establishment Clause is not adequately met by an assertion or even a finding that a purpose of the challenged statute was not to manifest hostility or inhibit religion; this Court has consistently held that even if the purpose of a challenged statute is neutral the mandate of neutrality is violated if its primary effect is to advance or inhibit religion. *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973).

C. *Inhibition of Religion*

In a large number of decisions, beginning with *Abington School District v. Schempp*, 374 U.S. 203, 222 (1963), and restated most recently in *Wolman v. Walter*, 433 U.S. 229, 236 (1977), the Court has held that in order to pass muster under the Establishment Clause "a statute must have a secular legislative purpose, must have a principal or primary effect that neither advances nor inhibits religion, and must not foster an excessive entanglement with religion." It may be conceded that the Act as here invoked and sought to be applied by the Board does have a secular purpose. We contend, however, that at the same time it does have a primary effect that inhibits religion.

We assume that it is unnecessary to argue that as applied to the instant case the term "primary effect" does not refer to the effect of compulsory collective bargaining on all elementary and secondary schools, including public and non-religious schools. Inasmuch as the overwhelming majority of these are not religious schools, the effect on inhibiting religion could hardly be considered a primary one. The "effect" criterion must obviously apply here to church schools. Nor need we argue that even in respect to such schools application of the Act to them would have "*the*" primary effect of inhibiting religion; the Establishment Clause invalidates any statute or its application which has "*a*" primary effect of inhibiting religion. That application of the Act to the present controversy would have such an effect would seem to be too obvious to require substantiation, and certainly not elaboration. Imposing upon church schools the mandate of collective bargaining would obviously result in higher salaries for employees, else what is bargaining for? In order to meet the obligations of compulsory school attendance laws there is a floor below which religious schools may not go in respect to secular studies without disqualifying themselves under those laws. Unlike public schools, the Establishment Clause forbids the state to help religious schools meet the added financial burden of increased salaries for teachers. Hence, the only alternative for financially burdened church schools is to sacrifice their religious teachings at least in part. Can it be doubted then

that the effect of compulsory collective bargaining would be an inhibition of religion? Can it be doubted too that in respect to church schools this would be a principal or primary effect?

Nor do increased salaries constitute the only inhibitory effect on religion. Collective bargaining entails job security as well as salary scales. Church schools rely heavily not only upon the competence of their teachers to teach religion, but no less upon their personal commitment to the substance of what they teach. Because religious schools do not receive tax-raised funds they have full freedom to discharge any teacher concerning whose religious commitment they have any doubt, nor are they under any obligation to justify the discharge to any governmental agency. Under the National Labor Relations Act an employer may not discharge an employee for union activities. Should a religious school feel it necessary to discharge a teacher because of doubts as to the sincerity of his or her religious commitment it would be required to justify the discharge to some governmental body, that is, to the National Labor Relations Board or to a court. In many cases, the financial and administrative burden of justification would impel continuance of employment as the lesser of evils. The inevitable result thus would be a substantial inhibitory effect upon religion.

D. *Entanglement*

In Everson,[6] and a number of other decisions,[7] the Court said:

> The "establishment of religion" clause of the First Amendment means at least this: . . . Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa."

We are unable to conceive of any significant collective bargaining agreement which, for its enforcement, does not entail significant participation in the affairs of the contracting parties. Suppose, for example, a church asserts that it is not financially able to meet any of the demands of the employees in a particular collective bargaining situation. Under existing law the National Labor Relations Board and the courts are empowered to investigate and determine whether the claim is asserted in good faith or is merely a device to frustrate collective bargaining. We are unable to see how this can be accomplished without substantial participation in the affairs of the church.

[6] 330 U.S. 1 at 15–16.

[7] *E.g. Torcaso v. Watkins*, 307 U.S. 488 at 492–493 (1961).

The same inhibition of participation in religious affairs is part of the threefold test expressed in the *Wolman* opinion and its predecessors, that is a law or its application violates the Establishment Clause if it fosters "an excessive entanglement with religion." The Court has not defined what entanglement would be excessive, nor is it likely that it or any other judicial tribunal can do so with any meaningful degree of particularity. It is sufficient for our purpose to compare the entanglement pregnant in the present controversy with those involved in *Lemon v. Kurtzman*, and the companion case of *Earley v. DiCenso*, 403 U.S. 602 (1971).

In the former case a statute was enacted in Pennsylvania authorizing public school authorities to contract with religious authorities to purchase from the latter secular teaching services for pupils in the nonpublic schools. In the latter the Rhode Island legislature provided for state supplementation of the salaries of teachers of secular subjects in nonpublic schools by paying to the teachers 15 percent of their current annual salaries. In both cases the challenged statutes were held unconstitutional because they fostered excessive entanglement with religion, in that state surveillance would be necessary to assure that the teachers did not participate in religious instruction and that the schools' records accurately reflected how much of the total expenditures were attributable to secular education and how much to religious activities.

It seems to us that at least as much entanglement would be involved should the Board or the courts be called upon to determine whether a particular teacher was discharged for

engaging in union activities or for teaching religious doctrine unacceptable to the particular church authorities under whose auspices the school operated. It is true, of course, there is no constitutional barrier to collective bargaining between teachers and public school authorities notwithstanding the fact that public school teachers may not teach religion in the classroom and may be dismissed if they do. But the First Amendment does not prohibit a state from becoming entangled with the internal affairs of its own schools; it does prohibit it from becoming entangled with internal affairs of church-related schools.

In sum, we submit that there is no way of avoiding the conclusion that application of the Act to church-related schools would result in both inhibition of and entanglement with religion.

II. The Board's Exercise Of Jurisdiction Over The Employers And Its Orders To Bargain Collectively Violate The Free Exercise Clause Of The First Amendment

A. *Introductory*

What we have set forth above in the introductory section of Point I in respect to the Establishment Clause is equally applicable here and need not be repeated. Before, however, we address ourselves affirmatively to the substance of the free exercise aspect of the Respondents' case we deem it appropriate to comment on one aspect of the Board's brief in respect to it. On page 27 of its brief the Board states:

> ***In furtherance of the strong interest of the State "in insuring that its youth may receive an adequate secular education," the government may require that church-related schools only employ teachers with adequate academic and other qualifications and may examine both teachers and pupils to ensure that the State's legitimate interest is being fulfilled." *Wolman v. Walter*, supra, 433 U.S. at 240.***

With all due respect we suggest that neither *Wolman*

nor any other decision of this Court holds any such thing.[8] The very next sentence in the paragraph in the brief from which we are quoting indicates what the Court in *Wolman*, and other cases, did hold:

> ***The State may also insist that parochial schools, *if they are to satisfy compulsory attendance laws*, offer a curriculum and a minimum numbers of hours of instruction comparable to that provided in public schools. (Citations omitted; emphasis added.)

However, in footnote 14 on the same page, the Board returns to its error. It states:

> The fact that parochial schools *must* comply with these regulations also undermines the court of appeals' view that the denial of government financial aid to such schools entitles them to be free of obligations under the Act. [Emphasis added.]

The fact of the matter is that ever since *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), the government may not dictate to church-related schools whom they shall employ or what they shall teach. It can do no more than require parents to fulfill their obligations under compulsory attendance laws by sending their children to state-approved schools or otherwise providing for the secular education of their children according to the state's minimum standards.

Applied to the controversy before the Court in the present case, this means that the Board or some other agency of government could adjudge that parents will not fulfill their obligations under compulsory attendance laws by sending their children to schools which refuse to bargain collectively with their teachers. If such a sanction were to be imposed

---

[8] What the Court held in *Wolman* is the following:

> There is no question that the State has a substantial and legitimate interest in insuring that its youth receive an adequate secular education. The State may require that *schools that are utilized to fulfill the State's compulsory education requirement* meet certain standards of instruction, and may examine both teachers and pupils to ensure that the State's legitimate interest is being fulfilled.*** [Emphasis added; citations omitted.]

against parents it would seem that the appropriate medium would be a state agency rather than the National Labor Relations Board or any other agency of the Federal government. But whatever the agency might be it would not, nor we submit could it, constitutionally impose the sanctions against the religious school.

We note here too, although it is also applicable if to a somewhat lesser extent, to the establishment aspect of our brief, that should the Court reverse the decision of the court of appeals and hold that the Catholic Church authorities must bargain collectively with their lay teachers it cannot logically hold otherwise in respect to clerical teachers. This is so because it is the Board's position that its jurisdiction is not predicated on who the teachers are but on what they do, that is, teach secular subjects. Perhaps this and all future Boards will unilaterally refrain from taking jurisdiction in collective bargaining efforts by teaching priests and nuns but perhaps they will not. How much governmental intervention in the relations between priests and nuns and their ecclesiastical superiors will affect the internal affairs of the Church is almost frightening to contemplate. If the Board has not seriously given consideration to the ultimate consequences of what it is calling upon the courts to do, it is, we suggest, the responsibility of the courts to do so.

B. *Free Exercise Limitations on Governmental Intervention*

In the absence of fraudulent misrepresentation, which we are sure the Board does not impute to the respondents herein, the government may not challenge the validity of a claim that compulsory collective bargaining would violate their religious commitments and thus impair their religious freedom. *United States v. Ballard*, 322 U.S. 78 (1944). Hence, the Board can prevail herein only by establishing a clear and present danger to some paramount governmental interest,[9] or, in more recently formulated but perhaps even more restrictive terminology, the existence of a compelling

[9] *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

state interest which impels government action. *Wisconsin v. Yoder*, 406 U.S. 205 (1972). As this Court has stated, in order to justify a substantial infringement upon a First Amendment right to the free exercise of religion, "[i]t is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, only the gravest abuses, endangering paramount interests, give occasion for permissible limitation. *Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

However worded, this is indeed a stringent test for a constitutionally permissible infringement upon the right to the free exercise of religion. National security undoubtedly meets it; hence the constitutionality of compulsory military service by persons whose religious commitments forbid it.[10] So, too, do compulsory innoculations to prevent communicable diseases,[11] the ban on child labor,[12] and administration of forced blood transfusions to save human life, at least where children are involved.[13] But with full recognition of the importance of collective bargaining in our socio-political economic system it is difficult to place it on the same level of constitutional values, and even more difficult when access to it involves only a relatively small group of employees, such as, in the present case, teaching employees in religious schools.[14]

[10] *United States v. Macintosh*, 341 U.S. 605 (1931), overruled on other grounds, *Girouard v. United States*, 328 U.S. 61 (1946).

[11] *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

[12] *Prince v. Massachusetts*, 328 U.S. 158 (1944).

[13] *People ex rel Wallace v. Labrenz*, 411 Ill. 618, certiorari denied, 344 U.S. 824 (1952).

[14] As pointed out in the Board's brief (p. 16), the court of appeals also distinguished "permissible governmental impingements upon the operation of church schools," such as fire inspections, zoning laws, and state compulsory attendance requirements, on the ground that such regulations, unlike a Board bargaining order, have no "clear inhibiting potential upon the relationship between teachers and employers."

We are unable to agree with this explanation. In respect to compulsory attendance laws, we have already noted that these are addressed not to the church school officials but to the parents, and their rationale is based upon the state's legitimate interest in assuring that all children receive a basic secular education. In respect to regulations regarding fire inspections and zoning laws (which apply to churches no

In judging the relative importance in our national goals of values of the competing claims in the present case, it is significant that Congressionally mandated collective bargaining is only slightly more than forty years old, and that, as noted in the opinion of the court below, the Board's extension of it to religious schools that teach secular subjects only three years old. Petition for Writ of Certiorari, p. 9a. Without denigrating in the slightest the importance of collective bargaining in our society, it is clearly not on par with the free exercise of religion. We can envision an America without compulsory collective bargaining, but not one without the free exercise of religion.

C. *Free Exercise and Compulsory Collective Bargaining*

The competing values before the Court in this controversy are not the free exercise of religion and collective bargaining. They are rather free exercise and government compelled bargaining. As noted in the Board's brief at page 29, Catholic schools quite similar to those involved here voluntarily engaged in collective bargaining with unions representing their lay teachers. After the court below handed down its favorable decision in the present case, Bishop William McManus of respondent Diocese of Fort Wayne-South Bend issued a press release in which he "urged Catholic school administrators and teachers to 'get busy' with contract negotiations***." *Ibid.* It is a fair assumption that in due time this will happen not only in the Fort Wayne-South Bend Diocese but in most of the other dioceses in the nation as well as in other religious schools offering secular educational programs. It is not collective

---

less than to church schools), their purpose is to protect the health and safety of children attending them, and are therefore constitutionally permissible exercises of the state's police power whether or not they have a clear inhibiting potential upon the relationship between teachers and employers, and even if they restrict the free exercise of religion on the part of parents, pupils, teachers and schools. A state law forbidding schools, including religious schools, from employing teachers unless they present medical proof that they have been innoculated against communicable diseases would certainly inhibit relationships between schools and teachers, yet the state's police power would clearly encompass its imposition and enforcement.

bargaining to which the religious schools object but rather to compulsion by law to participate in it. Should this Court affirm the decision of the court of appeals the most the unions would suffer would be some delay in achieving collective bargaining in church-related school systems. This, we suggest, is a small price for the maintenance of full religious freedom in our nation.

CONCLUSION

For the reasons set forth herein, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

LEO PFEFFER
EARL W. TRENT, JR.
Counsel for Amicus Curiae

July 1978